IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-5992

FRANK O'NEAL ADDINGTON,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

On Appeal from the Supreme Court of Texas

BRIEF FOR THE NATIONAL ASSOCIATION FOR MENTAL HEALTH, AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND AMERICAN PSYCHOLOGICAL ASSOCIATION AS *AMICI CURIAE*

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CITATIONS

TABLE OF CITATIONS—Continued

TABLE OF CITATIONS—Continued

TABLE OF CITATIONS—Continued

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INTEREST OF AMICI CURIAE

This brief is filed, pursuant to consents filed with the Clerk, on behalf of the National Association for Mental Health, the American Orthopyschiatric Association, the National Association of Social Workers, and the American Psychological Association as *amici curiae*.

The National Association for Mental Health is a private, nonprofit, voluntary citizens' organization with mem-

bers throughout the country working for the prevention of mental illness, the improvement of attitudes toward and services for the mentally disabled, and the promotion of mental health.

The American Orthopsychiatric Association is a national professional membership organization concerned with the problems of mental disorder and abnormal behavior. An interdisciplinary organization with 5700 members, it brings together in collaborative activity the behavioral, medical and social sciences.

The National Association of Social Workers is a nonprofit national organization of professional social workers which is devoted to the advancement of sound public policy for social work consumers as well as professionals. More than one-third of its 80,000 members are engaged in providing health and mental health services in public, voluntary and private institutional and out-patient settings throughout the country.

The American Psychological Association, a nonprofit professional organization with 47,000 members, is the major association of psychologists in the United States. Its purpose, as set forth in its Bylaws, is to "advance psychology as a science and profession, and as a means of promoting human welfare by the encouragement of psychology in all its branches in the broadest and most liberal manner."

The *amici* include both professional associations and "consumer" organizations, representing the interests both of institutional personnel and of institutionalized persons and their families. Accordingly, they are interested not just in providing adequate care and treatment for the mentally ill or in protecting the rights of individuals sought to be institutionalized, but in both. The *amici* have been involved in a number of important cases concerning the rights of the mentally ill, among them *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975).

STATEMENT OF THE CASE

On February 6, 1976, after a five-day jury trial, the State of Texas committed Frank O'Neal Addington to a mental hospital for an indefinite period. Over Addington's objections, the trial court had instructed the jury to determine, "based on clear, unequivocal and convincing evidence," whether Addington was "mentally ill," and whether he "require[d] hospitalization in a mental hospital for his own welfare and protection or the protection of others."[1] Under Texas law, indefinite commitment is mandatory upon such a finding. Addington appealed his commitment to the Texas Court of Civil Appeals, urging, *inter alia*, that the standard of proof applied in the trial court had denied him due process of law. The Court of Civil Appeals agreed that the trial court had erred in this respect, and remanded the case, holding that the State should be required to prove the factual basis for indefinite commitment beyond a reasonable doubt.

The State thereupon filed a writ of error in the Texas Supreme Court. That Court granted the writ of error and, without hearing oral argument, reversed the Court of Civil Appeals *per curiam* and affirmed the judgment of the trial court on the authority of its then-recent holding in *State* v. *Turner*, 556 S.W. 2d 563 (Tex. 1977) *cert. denied*, 46 U.S.L.W. 3586 (March 20, 1978), J.S.

[1] The court's instructions were limited to a verbatim repetition of the substantive standard for indefinite commitment set out in Section 52(b) of the Texas Mental Health Code, Tex. Rev. Civ. Stat. Ann., art. 5547 (1958 ed. and 1978 Supp.). As defined in the statute, and as explained by the court to the jury, "mentally ill" means "a mental condition which is such as to substantially impair the person's mental health." Jurisdictional Statement (hereinafter J.S.) D-5. See Mental Health Code § 4(k). The statute is silent with respect to the standard of proof. Addington had previously been hospitalized for sixty days for "observation and/or treatment" pursuant to an Order of Temporary Hospitalization, issued pursuant to Section 40 of the Code.

B-1.[2] In *Turner*, as in this case, a trial court instruction to employ a "clear and convincing" standard of proof had been held by the Court of Civil Appeals to be constitutionally insufficient on due process grounds; the Texas Supreme Court reversed that decision, ruling that proof beyond a reasonable doubt was not constitutionally required in civil commitment cases. In affirming the judgment of the trial court, however, it stated that "[i]n future cases of civil commitment the jury should be instructed that the burden is upon the State to prove by a preponderance of the evidence the statutory prerequisites to commitment." 556 S.W.2d at 566, J.S. B-7.[3]

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[2] Addington raised in the Court of Civil Appeals two other objections to the trial court's instructions: that the trial court had refused to instruct the jury that it must find (1) that Addington posed "a real and substantial risk of immediate and serious bodily injury;" and (2) that no less restrictive alternative to hospitalization was available. J.S. D-12. The Court of Civil Appeals did not rule on these alternative grounds for appeal, stating that "until we have an authoritative answer to the question of the quantum of proof required, we do not deem it either advisable or necessary to pass upon them." 546 S.W.2d 105, 106 (Tex. Civ. App. 1977), J.S. A-5. Since the Texas Supreme Court affirmed the judgment of the trial court rather than remanding to the Court of Civil Appeals, it appears to have disposed of Addington's other grounds of objection as well. If, as a matter of Texas law, those issues are still available to appellant, the decision of the Texas Supreme Court is not a "final judgment" within the meaning of 28 U.S.C. § 1257 unless one of the exceptions set forth in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), is applicable. We understand that any question as to this Court's jurisdiction will be dealt with by the parties.

[3] In *Turner*, the Texas Supreme Court said that under Texas law the clear and convincing standard should be employed only to test whether the evidence is factually sufficient to support the verdict. 556 S.W.2d at 565, J.S. B-5. The standard is used as a jury control device, enabling a judge to set aside a verdict that is against the weight of the evidence. *See Meadows* v. *Green*, 524 S.W.2d 509, 510 (Tex. 1975). The standard of clear and convincing proof is not used in Texas when instructing the finder of fact how to decide close questions. With the possible exception of certain equitable actions, *see Sanders* v. *Harder*, 148 Tex. 593, 227 S.W.2d 206, 210 (1950) (dictum), quoted in *Turner*, 556 S.W.2d at 565-66, J.S. B-5, Texas law directs application of a preponderance of the evidence standard in all civil actions.

It is plain that in affirming the trial court's judgment in this case, the Texas Supreme Court held, as it did in *Turner*, that the trial court had erred in instructing the jury to apply the clear and convincing standard of proof, rather than the preponderance test, but that the error was harmless, since Addington had been found to meet the statutory standards for commitment under "a stricter standard than is required." J.S. A-2, B-7. The issue presented on Addington's appeal is whether the Texas Supreme Court properly held that the reasonable doubt standard was not constitutionally required in his case.

We do not believe it follows, however, that a decision by this Court that beyond a reasonable doubt is not constitutionally required mandates affirmance of the judgment below. If this Court should rule that due process requires a stricter standard than preponderance of the evidence, it remains for the Texas Supreme Court to decide what alternative standard of proof would be appropriate as a matter of State law. The Texas Supreme Court could either adhere to its present unwillingness to recognize a clear and convincing standard of proof in civil suits, *see* note 3 *supra*, and adopt the reasonable doubt standard, or it could give controlling weight to its concern that a reasonable doubt standard would be inappropriate in civil commitment cases and adopt an intermediate standard. Accordingly, only if this Court agrees with the Texas Supreme Court that the preponderance standard is constitutionally permissible should it affirm the judgment below. Any other decision—regardless of the position that the Court takes on the reasonable doubt standard—should result in a remand to that court for whatever reconsideration it deems appropriate. As

the remainder of this brief will demonstrate, *amici* are particularly concerned that the Court not in any way endorse the preponderance standard in civil commitment proceedings.

SUMMARY OF ARGUMENT

The standard of preponderance of the evidence is wholly inadequate to protect the rights of individuals sought to be confined against their will by the state, for any reason whatsoever. Where an individual stands to be deprived of unconditional liberty, the standard of proof must be one which guarantees the highest degree of accuracy in the decision to commit. With the striking exception of the court below, every state and federal court which has considered the appropriate standard of proof for extended civil commitment of the mentally ill has rejected the preponderance standard.

Where an individual is sought to be committed on grounds that he or she may harm other people, or otherwise engage in criminal activities, the fact-finder must be instructed to exercise the greatest caution before voting to commit. Three of the *amici*—the National Association for Mental Health, the American Orthopsychiatric Association, and the National Association of Social Workers—believe that an individual may not be stigmatized as dangerous to the community and confined indefinitely by the state unless the facts justifying such confinement and stigmatization are proved beyond a reasonable doubt. *Amicus* American Psychological Association agrees to the extent that a standard of proof substantially higher than preponderance of the evidence is necessary, but takes no position with respect to the specific requirement of proof beyond a reasonable doubt as opposed to proof by clear and convincing evidence.

Amici find no merit in any of the grounds offered by the court below as justification for requiring that the

preponderance standard be used in all civil commitment proceedings. In particular, *amici* do not believe that the peculiar problems of proof in some civil commitment cases justify resort to a substantially lower standard of proof in light of the interests at stake—an individual's liberty and good name. In any event, difficulties of proof may to a considerable extent be alleviated by a more precise formulation of the substantive standard for commitment—as indeed they could have been in this case. And in those States which have adopted a high standard of proof there is no evidence that judges and juries are unwilling or unable to reach an affirmative commitment decision.

We have reviewed the laws governing involuntary hospitalization of the mentally ill in the fifty States (see Appendix hereto), and found that nearly three-quarters now require, either explicitly or by judicial interpretation, a high standard of proof in civil commitment proceedings. The civil commitment laws of most of the remaining States do not specify a standard of proof, and their courts appear not to have had occasion to consider the issue. The court below stands along among courts in recent years in its conclusion that the preponderance standard provides adequate protection for an individual's rights where indefinite confinement is at issue.

ARGUMENT

I. Where the State Seeks to Confine an Individual and Where the Substantive Standard Applied Subjects that Individual to the Risk of Stigmatization as Dangerous to Others, Due Process Requires the Highest Degree of Certitude in the Fact-Finding and Decision-Making Process.

The function of the standard of proof in any lawsuit is to "instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). More simply, it "tell[s] the factfinder how to decide close cases, and when to regard a case as close." Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299 (1977). The law proportions the standard of proof to the gravity of the consequence of an erroneous judgment. In an ordinary civil proceeding, the standard of preponderance of the evidence reflects an assessment that "a mistaken judgment for the plaintiff is no worse than a mistaken judgment for the defendant." C. McCormick, Evidence § 341, at 798 (2d ed. 1972). In a criminal case, the "interests of immense importance" which an individual has at stake make constitutionally "indispensible" the standard of proof beyond a reasonable doubt. *In re Winship*, *supra*, 397 U.S. at 363-64. The consequences for an individual who stands to be labeled by the state as "dangerous to others" and to be indefinitely confined [4] in a mental institution are at

[4] By "indefinite confinement" we mean not just confinement which has no fixed term, but any confinement other than temporary or short-term confinement. This may also be referred to as "extended confinement." The question of whether an individual may be temporarily confined on a lower standard of proof is not at issue in this case. *Cf. Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972).

least as grave as those attendant upon conviction of a crime.

A. *The Standard of Preponderance of the Evidence Does Not Comport with Constitutional Requirements of Due Process and Fair Treatment in Any Case Where an Individual's Unconditional Freedom Is at Stake.*

This court has recognized that "involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law." *O'Connor* v. *Donaldson*, 422 U.S. 563, 580 (1975) (Burger, C.J., concurring). *See also Humphrey* v. *Cady*, 405 U.S. 504, 509 (1972) (civil commitment entails a "massive curtailment of liberty"). The interest of "transcending value" which an individual has in liberty, *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958), requires that the fact-finder in a civil commitment proceeding be asked to do something more than "merely . . . perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum . . . ." *In re Winship*, *supra*, 397 U.S. at 368. The standard of proof must be one which "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts at issue." *Id.* at 364. And, as we discuss in Part II below, not a single other state or federal court which has considered the issue has found the preponderance standard to satisfy due process requirements where an individual's unconditional freedom is put at risk in a proceeding for extended civil commitment.[5]

[5] This case does not present the issue of what standard of proof may be acceptable in a civil proceeding to confine an individual who has already been judged guilty of a crime, or whose liberty is otherwise not unconditional. Compare *Tippett* v. *Maryland*, 436 F.2d 1153 (4th Cir. 1971), *cert. dismissed as improvidently granted sub nom. Murel* v. *Baltimore City Criminal Court*, 407 U.S. 355

After *Winship* and *O'Connor* v. *Donaldson*, *supra*, the state cannot seriously contend that the incarcerated individual's loss is mitigated by the fact that one of the purposes of the incarceration is treatment for mental illness. Indeed, one court of appeals has dismissed such an assertion as "archaic," stating that "[i]t is well settled that realities rather than benign motives or noncriminal labels determine the relevance of constitutional policies." *United States ex rel. Stachulak* v. *Coughlin*, 520 F.2d 931, 936 (7th Cir. 1975), *cert. denied*, 424 U.S. 947 (1976). *See also O'Connor* v. *Donaldson*, 422 U.S. at 589 (Burger, C.J., concurring) (the state may not "lawfully confine an individual thought to need treatment and justify that deprivation of liberty solely by providing some treatment. Our concepts of due process would not tolerate such a 'trade-off.' "). Indeed, one might well say that the loss of liberty which has resulted in this case is measurably greater than that involved in a criminal or juvenile proceeding, since Addington has been committed for an indeterminate period, and will be unable to regain his freedom until he can prove that he is no longer "dangerous to himself or others." *State* v. *Turner*,

(1972) (preponderance of the evidence meets constitutional standards for civil commitment under Maryland Defective Delinquent Law, where individuals involved had been convicted of various state crimes and sentenced to fixed terms of imprisonment); *State* v. *Krol*, 68 N.J. 236, 344 A.2d 289 (1975) (preponderance standard for persons acquitted by reason of insanity); and *Lausche* v. *Commissioner of Public Welfare*, 302 Minn. 65, 225 N.W.2d 366 (1974), *cert. denied*, 420 U.S. 993 (1975) ("Although [beyond a reasonable doubt] is a necessary standard to be employed with regard to the initial commitment, we cannot extend it to supplementary proceedings, including the petitions for discharge."); with *People* v. *Burnick*, 14 Cal. 3d 306, 121 Cal. Rptr. 488, 535 P.2d 352 (1975) (reasonable doubt standard constitutionally required for commitment of convicted criminal as "mentally disordered sex offender"); *In re Andrews*, 368 Mass. 468, 334 N.E.2d 15 (Mass. 1975) (same, for commitment as "sexually dangerous person"). *Cf. Baxstrom* v. *Herald*, 383 U.S. 107 (1966).

supra, 556 S.W.2d at 566, J.S. B-6. See sections 80 through 86 of the Texas Mental Health Code.

B. *Where an Individual Is Sought to be Confined on Grounds That He or She Constitutes a Danger to Others, Due Process Requires the Safeguard of Proof Beyond a Reasonable Doubt.*

1. *Where the proceedings put at risk both the good name and the freedom of an individual, the highest standard of proof is required.*

We have argued in the preceding section that the preponderance standard is never constitutionally acceptable where the state seeks to deprive an individual of unconditional liberty. Here we argue that "if the proceedings seriously put at risk both the personal liberty and the good name of the individual, the safeguard of proof beyond a reasonable doubt is required." *People* v. *Thomas*, 19 Cal. 3d 630, 638, 139 Cal. Rptr. 594, 598, 566 P.2d 228, 232 (1977). *See also In re Winship*, *supra*, 397 U.S. at 363-64.[6]

In *Winship* this Court held that proof beyond a reasonable doubt was required in criminal cases, not only because of the individual's potential loss of physical liberty, but also because of "the certainty that he would be stigmatized by the conviction." 397 U.S. at 363. It is not clear to us to what extent the stigma averted to in *Winship* inheres in the fact of incarceration itself, and to what extent it derives from the particular deeds an individual is found to have done. Nor is it entirely clear whether the stigma of being labeled a "delinquent" was

[6] *Amicus* American Psychological Association supports the arguments in this Part to the extent that they stand for the proposition that due process requires substantially more than the preponderance of evidence standard, but takes no position with respect to the specific requirement of proof beyond a reasonable doubt as opposed to clear and convincing evidence.

essential to the Court's extension of the reasonable doubt standard to juvenile proceedings. Assuming, however, that the risk of incarceration must be coupled with a risk of stigmatization in order to evoke the highest standard of proof, we think it plain that the stigma involved where an individual is branded as so dangerous to the community as to require his being locked up indefinitely is at least as great as, and probably substantially greater than, the stigma involved in being convicted of a crime like simple assault.[7]

In this case, the Court need not reach the issue of whether the stigma which may attach where nondangerous mentally ill individuals[8] are sought to be confined because they are not "capable of surviving safely in freedom," *O'Connor* v. *Donaldson*, *supra*, 422 at 576,

[7] *Cf. United States ex rel. Stachulak* v. *Coughlin*, *supra*, 520 F.2d at 936 ("an adjudication of sexual dangerousness is certainly more damning than a finding of juvenile delinquency"). *Accord, In re Andrews*, 368 Mass. 468, 488, 334 N.E.2d 15, 26 (1975). A few courts appear to have recognized that the risk of stigma alone may call for a higher standard of proof than the preponderance of the evidence. *See, e.g., Ziegler* v. *Hustisford Farmers' Mutual Insurance Co.*, 238 Wis. 238, 298 N.W. 610 (1941) (suit on fire policy, defense of arson by insured; burden on defendant by "clear and satisfactory" evidence); *In re Farris*, 229 Ore. 209, 367 P.2d 387 (1961) ("clear and convincing" standard in disbarment proceedings); *Ashley* v. *Ashley*, 118 Ohio App. 155, 193 N.E.2d 535 (1962) (clear and convincing evidence required to overcome presumption of legitimacy of a child born in wedlock); *Stephenson* v. *Stephenson*, 221 A.2d 917 (D.C. App. 1966) (adultery as grounds for divorce must be established by clear and convincing evidence).

[8] Recent evidence suggests an unfortunate and continuing public attitude toward mental illness which may subject an individual who has suffered from mental illness to hostility, fear, and scorn. *See* Appellant's Brief, Part II(B). In addition, studies have shown that the stigma attached to mental illness escalates with the degree of intervention by the state, so that individuals who have been compelled to spend any time in a mental institution for whatever reason suffer continuing adverse consequences after release. Bord, *Rejection of the Mentally Ill: Continuities and Further Developments*, 18 Soc. Prob. 469 (1971).

is sufficient to trigger the reasonable doubt standard.[9] As we will show, the stigma which attached to commitment in this case was sufficient to require the protection of the highest standard of proof.

2. *The substantive standard under which Addington was committed permitted an inference that he constituted a danger to others.*

Under the substantive standard for indefinite civil commitment set forth in Section 52(b) of the Texas Mental Health Code, the jury must find that an individual is "mentally ill," and "require[s] hospitalization for his own welfare and protection *or* the protection of others." (Emphasis added.) The trial court's instructions to the jury in this case did not require a finding that Addington was to be committed on one or the other, or even both, of the latter two grounds. Indeed, in his instructions the judge simply repeated the words of the statute, refusing Addington's request that they be amplified.[10] It is, then, open for us, as indeed it is for anyone, to conclude that Frank Addington was committed because a jury found

[9] Although the Texas Supreme Court stands alone among courts in recent years in concluding that the preponderance standard can ever be constitutionally acceptable where the state seeks to confine an individual indefinitely, *see* Part II *infra*, some courts and legislatures have concluded that there may be considerations weighing against the application of a reasonable doubt standard in the "safe survival" situation which are not present where an individual is charged with being dangerous to others. While rejecting the preponderance standard, they have held applicable in these situations what they regard as a somewhat less rigorous standard of proof. *See, e.g., In re Estate of Roulet*, 20 Cal. 3d 653, 143 Cal. Rptr. 893, 574 P.2d 1245, 1249 (1978) ("clear and convincing proof" sufficient to protect a "gravely disabled" person's rights without unduly "criminalizing" the proceedings), discussed further in notes 16 and 30, *infra*.

[10] Several of the instructions requested by Addington would appear to have offered the trial court an opportunity to clarify the substantive grounds on which the jury was being asked to commit. *See* J.S. D-1 through D-3, and notes 21-22 *infra*.

him to be so potentially dangerous to other people that he must be locked up.[11]

That the jury in fact reached this conclusion is strongly suggested by the record of the trial, during which "the jury heard for five days witnesses testify to assaults, threats, and serious destruction of property by Frank Addington." (State's Application for Writ of Error in the Texas Supreme Court, J.S. D-20.) These incidents were described to the jury by the attorney who presented the case for the State[12] as involving "violent behavior, deadly behavior, and in a continued course." (Tr. 1024.) The expert and other testimony adduced by the State at trial was almost entirely devoted to an attempt to show that Addington was imminently dangerous to the community; and it was suggested again and again that Addington, if not confined, would be likely to engage in criminal behavior.[13] In his summation to

[11] Some state civil commitment statutes set forth in one provision that mentally ill individuals may be confined if they are dangerous to themselves or to others, although the precise wording varies widely. *See* Appendix *infra*. These statutes thus combine in a single provision the two generally accepted justifications for commitment: "to ensure [an individual's] own survival or safety," and "to prevent injury to the public." *O'Connor* v. *Donaldson*, *supra*, 422 U.S. at 573-74. These alternative grounds for commitment tend to be more clearly disjunctive in recent statutory enactments. One State —California—has separate requirements for commitment proceedings in these two situations. *See* note 30, *infra*. We do not know how common is the practice found in this case of instructing the jury on both grounds without requiring agreement on either or both.

[12] The case for the State of Texas was presented by an Assistant Criminal District Attorney from Galveston County, the significance of which fact that individual himself felt compelled to comment upon during his voir dire of the jury. (Tr. 5.)

[13] The jury was made aware of the fact that Addington had in fact been charged several times with criminal acts, and the charges dropped in favor of temporary hospitalization. The State's attorney characterized the incidents which immediately preceded the institution of indefinite commitment proceedings as criminal, and specu-

the jury, the State's attorney asked them to consider whether they would "be afraid of him if he's released today and goes free about our streets." (Tr. 1054.)

The stigma of being labeled a prospective danger to the community is at least as great as the stigma of being labeled a past offender. The inchoate charge leaves room for endless speculation on what manner of antisocial acts may be anticipated from such an individual. By its very nature, this speculation is almost impossible to counteract even after one is no longer confined. To the extent that the substantive standard under which Addington was committed permits the inference that the jury found that his incarceration was necessary to protect other people from harm, a stigma of incalculable proportions has been imposed upon him. Under these circumstances, he was at least entitled to have the jury instructed to exercise the greatest caution before voting to commit.

C. *There Is No Countervailing State Interest in Applying a Lower Standard of Proof in this Case Which Outweighs the Individual's Transcendent Interest in Remaining at Liberty and Avoiding Stigmatization as Dangerous to Others.*

1. *Requiring the highest degree of certainty by the factfinder does not interfere with procedures which may be distinctive to the civil commitment process, or "criminalize" that process.*

As in *Winship*, there is no merit in an argument that to afford persons such as Addington the protection of proof beyond a reasonable doubt "would risk destruction of beneficial aspects of the [commitment] process." 397 U.S. at 366. In this case, the use of a higher standard would have had absolutely no effect on "the informality,

lated at length at several points during the trial on the consequences of Addington's being able to raise an insanity defense in future criminal prosecutions. *See* Tr. 571-77, 588-89, 1056-57.

flexibility, or speed of the hearing at which the factfinding [took] place." *Id.* Nor would it have had any effect on the procedures employed prior to the hearing on indefinite commitment. While as one court has noted, it "may result occasionally in an expanded hearing where the government chooses to muster additional evidence, '[t]he constitutional guarantee demands no less if the search for truth is not [to] be sacrificed to administrative speed and convenience.'" *In re Ballay*, 482 F.2d 648, 663 (D.C. Cir. 1973).

Nor would requiring the highest standard of proof have "criminalized" the commitment process in this case. Assuming that the concern here is for the impact which "criminalization" would have on the sensibilities of the individual proposed to be committed, where incarceration is sought even in part on grounds that one constitutes a danger to society, this nice concern is misplaced. In Addington's case, a concern for "criminalization" is particularly ironic: carrying the case for the State during a five-day trial was an Assistant Criminal District Attorney, whose summation to the jury suggests as great an interest in preventing criminal acts as in providing care and treatment. (Tr. 1050-1065.) In such a case, there is always the danger that civil commitment will be perceived as an alternative to criminal prosecution, with the state's task made simpler by the absence of many of those safeguards which are familiar incidents of criminal proceedings.[14]

[14] *Cf.* Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 Harv. L. Rev. 356, 383-84, n. 140 (1975) (suggesting that use of a standard of proof less stringent than beyond a reasonable doubt in civil commitments for "dangerous" individuals "will always leave the suspicion that the government is punishing defendants for conduct which it could not prove with sufficient force to invoke the criminal sanction as an original matter."). A lower standard of proof encourages the state to resort to the civil commitment process for dealing with persons who ought to be channeled through the criminal justice system and who may be entirely unreceptive to the treatment mandated by statute, *e.g.*, Texas Mental Health Code § 70, greatly overextending mental health care facilities and systems.

2. *The peculiar problems of proof in civil commitment cases do not justify the application of a lesser standard, but rather suggest the need for utmost care in reaching the commitment decision.*

The Texas Supreme Court in the *Turner* case gave as its principal reason for adopting the preponderance standard in civil commitment cases its concern that "the State's ability to act as *parens patriae* for the mentally ill would [otherwise] be impaired." Quoting from the decisions of the highest courts of two sister states,[15] it held that the preponderance standard was the only one that would enable a jury to make a "determination of *future* conduct and *future* need . . . ." 556 S.W.2d at 566. (Emphasis in original.)

It is true that a number of courts have held back from requiring the reasonable doubt standard in civil commitment proceedings even while rejecting the preponderance standard, because "the questions involved are the primarily subjective ones of the subject's mental condition and the likelihood that he will be dangerous in the future. Such subjective determinations cannot ordinarily be made with the same degree of certainty that might be achieved where purely objective facts and occurrences are at issue." *Lynch* v. *Baxley*, 386 F. Supp. 378, 393 (M.D. Ala. 1974). *See also In re Stephenson*, 67 Ill. 2d 544, 367 N.E.2d 1273, 1277 (1977) ("[p]redictions of

[15] The Texas Supreme Court did not remark on the fact that in neither of the two cases it relied upon did the State court accept the preponderance standard for civil commitment. Indeed, in both *State ex rel. Hawks* v. *Lazaro*, 202 S.E.2d 109 (W. Va. 1974), and *In re Beverly*, 342 So. 2d 481 (Fla. 1977), the preponderance standard was specifically rejected in favor of a standard requiring, respectively, "proof that is clear, cogent, and convincing," 202 S.E.2d at 127, and "clear and convincing evidence." 342 So. 2d at 488.

dangerousness can hardly be beyond a reasonable doubt in the undeveloped framework of the science of psychiatric diagnosis and prediction, for the subjective determinations therein involved are incapable of meeting objective certainty"). *See also* Part II *infra*. Since the reasoning of these cases can be, and in this case has been, used to support the preponderance standard, we think it important to point out its shortcomings, without suggesting that we necessarily disagree with the courts' particular articulation of the standard of proof on the facts of those cases.[16]

Two fallacies underlie the reasoning of the courts which have declined to apply the highest standard of proof in civil commitment proceedings because of perceived problems of proof. First, the problems of proof in a civil commitment proceeding derive more from confusion about the substantive standards for commitment than from any peculiar difficulties of proving the facts justifying commitment of a mentally ill individual. The reasoning of the New Hampshire Supreme Court, rejecting an argument by the State that the reasonable doubt standard was "unworkable" in the civil commitment context, is instructive:

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[16] It may well be that the reasonable doubt standard is inappropriate for some types of civil commitments, and that in some cases the "clear and convincing" formulation favored by a number of courts may be more consonant with the nature of the procedure, or the severity of the deprivation. *See, e.g., In re Estate of Roulet, supra*, 20 Cal. 3d 653, 143 Cal. Rptr. 893, 574 P.2d 1245 (proceeding to appoint the State as conservator for "gravely disabled" individual; conservatorship terminates automatically after one year and the conservatee has the right upon request to release from an institution in which she or he may have been confined). But the case now before this Court does not present an occasion for considering these possibilities, since, as we have shown, the stigma attached to the outcome of the proceeding here was by its nature a quasi-criminal one, and since Addington's incarceration was potentially life-long.

> "While it is undoubtedly true that some persons who might be committed under a lesser standard will 'go free' under a reasonable doubt standard, the state's fear that disturbed persons can *never* be committed is not persuasive. We note that it is not dangerous [*sic*] in any absolute sense of which the trier of fact must be convinced, but rather 'a potentially serious likelihood' of dangerousness. It is not difficult to conceive of circumstances in which evidence of past conduct and mental disability will convince 'beyond a reasonable doubt' of a potentially serious likelihood of dangerousness. 'Proof of mental state . . . is a commonplace in the law, and despite the difficulty of establishing many controverted facts in a criminal trial, we steadfastly adhere to the reasonable-doubt burden of proof.' " *Proctor* v. *Butler*, 380 A.2d 673, 677 (N.H. 1977), quoting from *United States ex rel. Stachulak* v. *Coughlin*, 520 F.2d 931, 936 (7th Cir. 1975), *cert. denied*, 424 U.S. 947 (emphasis in original).

We too are not persuaded that the difficulties which inhere in proof of the commitment criteria are substantially different from those which may be presented by proof of mental state in the criminal context, particularly where an individual is alleged to be dangerous to others. Nor are we persuaded by the assertion of some courts, and indeed by some members of the medical profession, that it is "impossible" to reach a conclusion on the criterion of "dangerousness" beyond a reasonable doubt. If one accepts the dictionary definition of "dangerous," for example, "able or likely to inflict injury,"[17] a finding that individuals are "dangerous" does not require a prediction that they are *going* to cause harm to others, but at most a judgment, based on past actions and present

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[17] Webster's Third New International Dictionary (1975).

mental state, that they are likely to do so.[18] The fact-finder in such a case, whether judge or jury, is almost certain to be confronted with concrete evidence of past and present conduct from which, with the assistance of expert testimony and clinical diagnosis, may be inferred the likelihood of an individual's causing harm to someone else.[19] It is entirely unnecessary that what in Texas is an important jury function be reduced to mere "prediction" or "speculation."[20]

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[18] *See* Note, *The Supreme Court 1969 Term*, 84 Harv. L. Rev. 1, 164 (1970) ("It would not be anomalous for a fact-finder to believe without any doubt that a person was 'dangerous' while still in doubt whether he would commit any specific harm if released.")

[19] *See Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270, 274 (1940) (statutory standard for commitment as "sexual psychopath" calls for proof of "habitual course of misconduct in sexual affairs" such that individuals are "likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled desire;" these conditions, "calling for evidence of past conduct pointing to probable consequences, are as susceptible of proof as many of the criteria constantly applied in prosecutions for crime.") A number of states require proof of some recent "overt act" warranting confinement. *See, e.g.*, Ala. Code tit. 22, § 52-10 (1975 ed. & 1977 Supp.); Mass. Ann. Laws Ch. 123, § 8 (1972 ed. & 1978 Supp.); Neb. Rev. Stat. § 83-1009 (1977 Supp.); Ohio Rev. Code Ann. § 5122.01 (1970 ed. & 1976 Supp.); Pa. Cons. Stat. Ann. tit. 50, § 7301 (1969 ed. & 1978 Supp.).

[20] This Court has recognized that "most, if not all" States condition civil commitment "not solely on the medical judgment that the individual is mentally ill and treatable, but also *on the social and legal judgment* that his potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty. In making this determination, the jury serves the critical function of introducing into the process *a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment.*" *Humphrey* v. *Cady*, *supra*, 405 U.S. at 509 (emphasis added). Some commentators have argued for limiting the role of experts in civil commitment proceedings, on grounds that the exaggerated importance given their often differing opinions deprives the jury of its fact-finding function. *See, e.g.*, Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Calif. L. Rev. 693 (1974). In too many

There would have been ample opportunity in a situation such as this one for clarifying instructions to the jury on the degree of acceptable risk in light of the probable magnitude of harm and the likelihood of its occurrence, which would give due weight to the interests of both the state and the individual.[21] In addition, the avail-

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cases where mental illness is involved, the concept of "dangerousness" has been permitted to reflect "clinical definitions and conclusions rather than the appropriate judicial exegetics and community values." *In re Ballay*, *supra*, 482 F.2d at 665.

[21] The trial court refused Addington's request that the statutory standard be construed to require hospitalization only if "necessary to protect him from immediate and serious bodily harm," and if "he will cause immediate serious bodily injury to someone other than himself." J.S. D-2.

This Court has never directly spoken to the constitutional sufficiency of the standards embodied in commitment statutes such as the one involved here, *cf. Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270 (1940), and the issue is not now before the Court. We note, however, that the substantive standards for commitment in the Texas Mental Health Code have not received an authoritative construction from the highest court of that state. *See* note 2, *supra*. In *Reynolds* v. *Sheldon*, 404 F. Supp. 1004 (N.D. Tex. 1975) (three-judge court), the phrase "for his own welfare and protection and the protection of others" in the Texas Mental Health Code was sustained against a challenge that it was unconstitutionally vague. Acknowledging that the "welfare and protection" standard was "slightly ambiguous," the court construed it to be "[n]ot in itself broader than the Supreme Court's due process standard in *O'Connor* v. *Donaldson*." 404 F. Supp. at 1009. The court stated that the "proper interpretation of 'protection' is 'protection from danger,' which makes the terms 'protection' and 'dangerous' co-extensive." *Id.* The *Reynolds* court did not comment on the statute's failure to differentiate between persons whose mental illness makes them "dangerous" to themselves and those who may be "dangerous" to other people; it did say, however, that the statutory standard does not "condone involuntary confinement of an individual merely for care and assistance where there is no danger of physical nor serious non-physical consequences to the individual if he were not confined." *Id.* The *Reynolds* court's construction of the statutory standard for commitment was relied upon by the Texas Court of Civil Appeals in rejecting a vagueness challenge to the same statute, *Powers* v. *State*, 543 S.W.2d 194, 195 (Tex. Civ. App. 1976). In *Powers*, the court

ability of alternatives to hospitalization under a state's mental health program may helpfully illuminate the criteria warranting such a drastic measure, and narrow the substantive grounds for confinement which the jury is asked to consider.[22] Certainly it should not be "impossible" for the state to meet *some* substantive standard "beyond a reasonable doubt."

The second fallacy underlying the reasoning of those courts which have rejected the reasonable doubt standard is their assumption that the solution to the problem of statutory vagueness is in lowering the standard of proof. Applying a lower standard of proof will not make the standard any more precise or reduce the number of errors in decision-making, but merely increases the likelihood that the jury will find what the state asks it to find. The risk of error is thus shifted in a direction against the individual's interest in freedom and in favor of the state's interest in confinement. But here, as in the criminal field, the risk of error resulting from the application of the substantive standard should be borne predominantly by the state, not by individuals who are brought within its ambit.[23]

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noted that the phraseology of the Texas statute was "very similar to and substantially the same" as the Wisconsin statute construed by this Court in *Humphrey* v. *Cady*, 405 U.S. 504, 509 (1972).

[22] The trial court refused Addington's request that the jury be instructed to find that "commitment to a mental hospital is the *only available means* by which his own welfare and protection and the protection of others may be achieved." J.S. D-1 (emphasis supplied). *Cf. Robinson* v. *California*, 370 U.S. 660, 665 (1962).

[23] Similarly, a high standard of proof will not cure defects in a substantive standard. In *In re Ballay*, *supra*, 482 F.2d at 667, the court of appeals suggested that "[w]hile a more rigorous standard of proof may not allay infirmities in substantive statutory elements it certainly may, and the reasonable doubt standard is designed particularly to, partially offset them *by reducing the risk of factual error.*" (Emphasis added). *See also* Combs, *Burden of Proof and Vagueness in Civil Commitment Proceedings*, 2 Am. J. Crim. L. 47, 62 (1973). As one commentator has remarked with respect to the *Ballay* court's reasoning, "[t]here appears to be no relationship between the problem and the suggested solution. . . . [I]t seems that the proper response to vague commitment standards is not to demand a high standard of proof but to declare the statute unconstitutional." *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1297, n. 190 (1974) (hereinafter cited as *Developments—Civil Commitment*). The objective of the *Ballay* court, which is reflected in other parts of its opinion, was not so much to reduce the number of errors in decision-making as to weight the risk of error against the state and in favor of the individual in the civil commitment context. *See also* Note, 42 U. Cinn. L. Rev. 751, 758 (1973) ("The casualty of an application of the [reasonable doubt] standard need not be the workability of the commitment system, but the vague terminology. Strict requirement of proof beyond a reasonable doubt may help to winnow the meaningless from the classifications and forge a new and more accurate statutory language.")

In sum, problems of proof do not justify a lower standard of proof in civil commitment proceedings.[24] As the New Hampshire Supreme Court has put it:

> "The certitude required as a matter of due process reflects the severity of the deprivation imposed—not the difficulties which may inhere in the proof of the commitment criteria imposed by the legislature. 'The law, in short, does not weaken the standard of proof merely because the evidence is weak.'" *Proctor* v. *Butler*, *supra*, 380 A.2d at 677, quoting from *People* v. *Burnick*, *supra*, 14 Cal. 3d at 330, 121 Cal. Rptr. at 504, 535 P.2d at 368.

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[24] Scholarly opinion appears to reject unanimously the preponderance standard of proof for civil commitment proceedings. Many writers support the reasonable doubt standard: *Developments—Civil Commitment*, *supra*, 87 Harv. L. Rev. at 1295-1303; Note, 42 U. Cinn. L. Rev. 751, 758-59 (1973); Note, *The Supreme Court 1969 Term*, 84 Harv. L. Rev. 1, 163-65 (1970); Note, *Civil Commitment of Narcotics Addicts*, 76 Yale L.J. 1160, 1180-83 (1967). Others favor what they regard as an intermediate standard of proof: Note, *Involuntary Civil Commitment—How Heavy the Burden?*, 29 Baylor L. Rev. 187 (1977); Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 Harv. L. Rev. 1288 (1966); Note, *Due Process and the Development of "Criminal" Safeguards in Civil Commitment Adjudications*, 42 Fordham L. Rev. 611 (1974).

II. A Survey of State Laws Governing Civil Commitment of the Mentally Ill Shows That the Preponderance of the Evidence Standard Is an Anomaly Where Extended Confinement Is Sought.

We have surveyed the State laws governing general civil commitment of the mentally ill [25] to determine what standards of proof are now common. The results of that survey are presented in tabular form in the Appendix to this brief. The laws relating to commitment of the mentally ill have undergone substantial revision in many States in recent years. While these laws are not uniform in the wording of their substantive requirements, or in their procedural requirements for such matters as jury trials, post-commitment judicial review, and release, it is striking that nearly three-quarters—either expressly or as judicially construed—require the fact-finder to reach a high degree of certitude before making the decision to commit.

Seven States have adopted the reasonable doubt standard by statute.[26] In five States and the District of Columbia, the courts have construed the commitment statutes to require proof beyond a reasonable doubt.[27] Nineteen

[25] By "general civil commitment" laws we mean those that provide for the indefinite or extended confinement of individuals found to be mentally ill, and, in some sense, dangerous to themselves or others. They are to be distinguished from specialized commitment provisions adopted by some states to deal with senile or mentally retarded persons in need of custodial care who are not within the definition of "mentally ill," or with persons classified as "sexually dangerous" or "defective delinquents." Commitment of persons in the latter categories is generally sought subsequent to their conviction of a crime. *See* note 5, *supra*.

[26] Hawaii, Idaho, Kansas, Oklahoma, Oregon, Utah, and Wisconsin. *See* Appendix *infra*.

[27] *In re Hodges*, 325 A.2d 605 (D.C. 1974); *In re Bullay*, 482 F.2d 648 (D.C. Cir. 1973); *Denton* v. *Commonwealth*, 383 S.W.2d 681 (Ky. 1964); *Superintendent of Worcester State Hospital* v. *Hagberg*, —— Mass. ——, 372 N.E.2d 242 (1978); *Lausche* v.

States have adopted a "clear and convincing proof" standard by statute,[28] and in another four States the courts have construed the commitment statute to require proof that is clear and convincing.[29] In California, clear and convincing proof is required in "grave disability" proceedings, and proof beyond a reasonable doubt appears to be required where an individual is alleged to be "imminently dangerous" to others.[30] Montana's recently en-

Commissioner of Public Welfare, 302 Minn. 65, 225 N.W.2d 366 (1974), *cert. denied*, 420 U.S. 993 (1975); *Proctor* v. *Butler*, 380 A.2d 673 (N.H. 1977). In New Jersey, the lower courts have held that the reasonable doubt standard applies to civil commitment of the mentally ill, *see, e.g., In re J.W.*, 44 N.J. Super. 216, 130 A.2d 64 (App. Div.), *cert. denied*, 24 N.J. 465, 132 A.2d 558 (1957); *In re Heukelekian*, 24 N.J. Super. 407, 94 A.2d 501 (App. Div. 1953), though a more recent decision of the New Jersey Supreme Court in a case involving the commitment of a person acquitted by reason of insanity has cast some doubt on the continued validity of these cases. *State* v. *Krol*, 68 N.J. 326, 344 A.2d 289 (1975). *See* Note, 7 Seton Hall L. Rev. 412 (1976).

[28] Arizona, Colorado, Connecticut, Delaware, Iowa, Louisiana, Maine, Maryland, Michigan, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Washington. *See* Appendix *infra*.

[29] *Lynch* v. *Baxley*, 386 F.Supp. 378 (M.D. Ala. 1974); *In re Beverly*, 342 So. 2d 481 (Fla. 1977); *In re Stephenson*, 67 Ill. 2d 544, 367 N.E.2d 1273 (1977); *State ex rel. Hawks* v. *Lazaro*, 202 S.E.2d 109 (W. Va. 1974).

[30] California appears to be the only State which distinguishes between procedures applicable where commitment is to ensure an individual's safety and survival, and where it is intended to prevent injury or other harm to others. Under California's Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5001 *et seq.*), separate procedures govern the commitment of "gravely disabled" individuals and individuals who are alleged to be "imminently dangerous." A "gravely disabled" person is defined as one who, "as a result of a mental disorder, is unable to provide for his personal needs for food, clothing, or shelter." Welf. & Inst. Code § 5008(h). In a proceeding to commit an "imminently dangerous" person, the state must show "threatened, attempted, or actual physical harm to the person of another as well as an imminent threat of physical harm to others by reason of a mental disorder." *In re Estate of Roulet*,

acted civil commitment statute requires "proof beyond a reasonable doubt with respect to any physical facts or evidence, and clear and convincing evidence as to all other matters, except that mental disorders shall be evidenced to a reasonable medical certainty." [31]

Only one state—Mississippi—still specifies the preponderance of the evidence standard in its civil commitment statute.[32] Texas, as shown by this case, now requires preponderance of the evidence by judicial decision. The remaining eleven states do not specify the standard of proof for indefinite commitment of the mentally ill in

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supra, 574 P.2d at 1258. *See* Welf. & Inst. Code § 5300 *et seq.* In the *Roulet* case, the California Supreme Court upheld the lesser procedural safeguards applicable in "grave disability" proceedings against an equal protection challenge. In rejecting an argument that jury unanimity should be required in "grave disability" proceedings, the court remarked on the different interests of the State in the two commitment situations:

> "The verdict disparity between imminent danger proceedings and grave disability proceedings is justified because the persons subject to the different procedures are not similarly situated. Unlike a gravely disabled person, an imminently dangerous person poses a threat of harm to others. This danger gives rise to a governmental interest, analogous to the governmental interest in criminal proceedings. When the government's actions are motivated not only by benevolence toward the individual, but also by an interest in protecting others from the individual's behavior, potential for abuse exists. The proceedings may be misused as a substitute for criminal prosecution, justifying the additional safeguard of jury unanimity to protect the individual against the risk of error. . . . This additional governmental interest is reflected by the fact that commitment of those found to be imminently dangerous is mandatory. . . . Because this interest is not present in grave disability proceedings, imminently dangerous and gravely disabled persons are not similarly situated." 574 P.2d at 1250-51.

[31] Mont. Rev. Codes Ann. § 38-1305(7) (1977 Supp.)

[32] Miss. Code Ann. § 41-21-75 (1977 Supp.)

their statutes and do not appear to have reported decisions addressing the issue.[33]

The above summary shows that nearly three-quarters the States—thirty-seven and the District of Columbia—now require a higher standard of proof than preponderance of the evidence. By contrast, as late as 1974 "the preponderance standard [was] apparently in use in most jurisdictions." *Developments—Civil Commitment*, *supra*, at 1290. And, although in 1974 it was said that "[c]ommitment statutes generally do not specify the burden of proof necessary to commit," *id.* at 1290, n. 201, twenty-seven States have now adopted a high standard of proof by statute.

It is true that both state and federal courts are divided on the issue of whether the standard of proof in civil commitment proceedings should be "beyond a reasonable doubt," or what many regard as the less rigorous standard of "clear and convincing proof." [34] But where an

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[33] Alaska, Arkansas, Georgia, Indiana, Missouri, Nevada, New York, Rhode Island, Vermont, Virginia, Wyoming. The question of the proper standard of proof under the Vermont civil commitment statute was recently presented to the Vermont Supreme Court in *State* v. *O'Connell*, 383 A.2d 624 (Vt. 1978), a case in which the trial court had applied the preponderance standard. The Vermont Supreme Court reversed the commitment order on grounds that the trial court had failed to make the finding of present mental illness required by the statute, and hence did not reach the question of whether the preponderance standard was adequate. In New York, preponderance of the evidence has been held sufficient where commitment is temporary. *Fhagen* v. *Miller*, 65 Misc.2d 168, 317 N.Y.S. 2d 128 (Sup. Ct. 1970), *aff'd*, 36 A.D.2d 926, 321 N.Y.S.2d 61, *aff'd*, 29 N.Y.2d 348, 278 N.E.2d 615, 328 N.Y.S.2d 393 (1972), *cert. denied*, 409 U.S. 845 (1972) (involving 15- and 60-day commitment orders). Under New York law, commitment orders may never be for an indefinite period; they expire after a stated term, whose maximum in any case is two years. N.Y. Mental Hyg. Law § 31.33(d) (McKinney) (1975 ed. & 1978 Supp.)

[34] The "clear and convincing" standard of proof has been required by this Court in civil cases where governmental actions have a significant impact upon individual rights, *see, e.g.*, *Woodby* v.

otherwise free individual stands to be deprived indefinitely of that freedom, the verdict against the preponderance standard has been virtually unanimous. Even when courts have shown reluctance to require proof beyond a reasonable doubt, usually for one or more of the reasons cited by the Texas Supreme Court in the *Turner* case, they have not given serious consideration to the preponderance standard as an alternative.[35]

In those States which have opted in favor of a "clear and convincing" standard of proof, as opposed to the reasonable doubt standard, the principal concern appears to be the possibility, because of the current state of medical knowledge, that many mentally disabled people would go uncared for if a fact-finder were obliged to exclude

Immigration and Naturalization Service, 385 U.S. 276, 285-86 (1966); and where constitutional interests are at stake in civil litigation, *see, e.g., Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 50-51 (1971). The general assumption that that standard requires a significantly higher degree of certitude from the fact-finder than the preponderance standard has been empirically demonstrated. Underwood, *supra*, 86 Yale L.J. at 1309-11. It is much less clear, however, whether juries recognize the difference between the "clear and convincing" and "reasonable doubt" standards. *Id.* It appears, however, that many judges believe there to be one in the civil commitment context. *See, e.g., State ex rel. Hawks* v. *Lazaro*, 202 S.E.2d 109, 127 (W. Va. 1974) (rejects both preponderance and reasonable doubt standards, requires "proof that is clear, cogent and convincing"); *In re Stephenson*, 67 Ill. 2d 544, 367 N.E.2d 1273 (1977) (same, requires "clear and convincing" evidence); *Lynch* v. *Baxley*, 386 F. Supp. 378 (D. Ala. 1974) (same). And of course the Texas courts involved at various points in Addington's case appear to have assumed that the reasonable doubt standard would place on the State a significantly greater burden of persuasion than the "clear, unequivocal and convincing evidence" standard employed by the trial court. *But see Superintendent of Worcester State Hospital* v. *Hagberg*, —— Mass. ——, 372 N.E.2d 242, 246 (1978) (reasonable doubt standard; "we doubt the utility of employing three standards of proof when two seem quite enough"); and *In re Levias*, 83 Wash. 2d 253, 517 P.2d 588, 590 (1973) (clear and convincing is the "civil counterpart" of reasonable doubt).

[35] *See, e.g.*, the cases cited at note 15, *supra*.

every reasonable doubt with respect to the need for confinement. But there is no evidence that in the dozen or so states which do require proof beyond a reasonable doubt, commitment has been "impossible," or indeed that the State has not continued to prevail in a substantial portion of those cases in which it seeks indefinite confinement.[36] There may of course be other explanations for this phenomenon; it may be, for example, that there are not as many commitment proceedings initiated, and that alternatives to commitment are more seriously considered in those States where a heavy burden of persuasion has been placed on the state to show that commitment is necessary "beyond a reasonable doubt."[37] It may also be that the distinction between "clear and convincing" and "reasonable doubt" seen by some of these courts is less real as a practical matter than a reflection of a felt sense of not wanting to apply a term associated with criminal prosecutions to a process in which helpless and guiltless human beings are often caught up. *See, e.g., In re Levias*, 83 Wash. 2d 253, 517 P.2d 588 (1973). This sense of propriety, of not wanting further to stigmatize

[36] *See, e.g.*, Zander, *Civil Commitment in Wisconsin: The Impact of Lessard* v. *Schmidt*, 1976 Wis. L. Rev. 503, 557-59 (1976); Mental Health Divison, Hawaii State Department of Health, *A Review of Admissions to Hawaii State Hospital*, Report Prepared for Third Conference on the Law, May 15-16, 1978, at 4.

[37] In many of the States requiring proof beyond a reasonable doubt, and in some requiring "clear and convincing" proof, the fact-finder must find that there is no suitable alternative means of caring for a mentally ill individual that would be less restrictive than hospitalization. *See, e.g.*, Mass. Ann. Laws ch. 123, § 8 (1972 ed. & 1978 Supp.); Minn. Stat. Ann. § 253A.02 (1971 ed. & 1978 Supp.); Tenn. Code Ann. § 33-604(d) (1977 ed.); Utah Code Ann. § 64-7-36(6) (1977 ed. & 1978 Supp.). *See also* Va. Code § 37.1-67-3 (1950 ed. & 1977 Supp.). In a study of civil commitment in two Wisconsin counties, the significantly lower commitment rate in one was explained in part by that county's "case-by-case effort to secure alternative treatment for otherwise committable defendants." Zander, *supra*, 1976 Wis. L. Rev. at 558.

a mentally ill individual, may in some cases be entirely understandable and appropriate. But where the gravamen of the proceeding itself is to impose the quasi-criminal stigma of "dangerous to the community," a sharp reminder of the need to be extraordinarily cautious is in order.

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APPENDIX

APPENDIX

Introduction:

This Appendix surveys, in tabular form, the substantive standards for extended confinement under present State civil commitment laws, the type of proceeding provided, the applicable standard of proof, and the maximum duration of a commitment order. We have attempted to obtain this information from the most recent available editions of each State's statutes, including supplements, and from session laws, as noted in the first column of the Table. In many States, civil commitment laws have undergone sweeping changes in the past several years, all of which may not yet be reflected in the statute books. In a number of other States, the process of statutory change is still underway. For this reason, the information contained in this Appendix may not be either complete or entirely current.

Criteria for Extended Confinement of the Mentally Ill:

In the second column of the Table, the substantive criteria for extended confinement are for the most part reproduced verbatim from the statutes. Most States make separate provision in their statutes for emergency or short-term confinement, for periods ranging from 48 hours to 60 days; we have not shown the extent to which the substantive criteria for confinement under these provisions differ from those which warrant confinement for extended periods of time. There has been no attempt to incorporate judicial construction of these criteria except where it would substantially narrow or clarify them. In most States, a finding of "mental illness" must accompany a finding on the other substantive criteria, before a commitment order can be issued. But this independent criterion has not been separately noted in the Table, except where the definition of "mental illness" itself incorporates

additional criteria for commitment. Where alternative grounds for confinement are clearly demarcated as such in the statute, they have been separately listed; where apparently alternative grounds are combined in a single phrase in the statute, they have not been separated.

Maximum Duration of Commitment Order:

The third column of the Table indicates the maximum period of time for which an individual may be confined pursuant to a judicial commitment order. Some statutes specify that a commitment order is for an indefinite or indeterminate period, and some specify no maximum period. Of statutes in the latter category, complementary statutory provisions on termination of confinement or periodic reporting obligations suggest that it is in fact for an indefinite time, usually until the person is no longer "mentally ill." Clarifying comments have been made where possible. In an increasing number of States, commitment orders are for a limited period of time; they may, however, be renewed upon petition to the court which issued the original order. In such cases, a full *de novo* hearing must be sought on the substantive grounds for commitment each time an order expires.

Right to Jury Trial:

All but three States provide for a judicial determination on the substantive criteria for commitment before an individual may be confined for an extended period of time. In Maryland, Nebraska, and South Dakota, involuntary commitment orders are issued by an administrative body. In some State statutes, a right to jury trial is explicitly provided, while in others there is no mention of a jury right. Only one State, Alabama, specifically denies a right to a jury trial in a judicial commitment proceeding. There has been no attempt to indicate which States may provide for jury trial in civil proceedings generally, so that a failure separately to specify a jury right in commitment procedings need not mean that one is not available. Where the statute does not mention the availability of a jury trial, the Table indicates the court of competent jurisdiction in which the trial or hearing is held.

Standard of Proof:

Where the statute explicitly calls for a particular standard of proof, the Table so indicates. Where the statute is silent with respect to the standard of proof, but there has been an authoritative judicial interpolation of the appropriate standard, this has also been indicated. In a few cases where the statute is silent, judicial decisions on closely related issues suggest that a particular standard of proof will be applied; this has been indicated by footnotes at the appropriate place in the Table itself

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
ALABAMA Ala. Code tit. 22, § 52-1 et seq. (1975 ed. & 1977 Supp.)	"poses a real and present threat of substantial harm to himself or to others"; "the threat of substantial harm has been evidenced by a recent overt act"; and "treatment is available for the person's mental illness or . . . confinement is necessary to prevent the person from causing substantial harm to himself or to others" (§ 52-10)	Unspecified	No (§ 52-9(4))	"clear, unequivocal and convincing evidence" (Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974))
ALASKA Alaska Stat. § 47.30.010 et seq. (1962 ed. & 1977 Supp.)	(1) "likely to injure himself or others if allowed to remain at liberty" or (2) "is in need of immediate care or treatment in a hospital" and "lacks sufficient insight or capacity to make responsible decisions concerning hospitalization" (§ 47.30.070(1))	"Indeterminate" (§ 47.30.070(1))	Yes (§ 47.30.070)	Unspecified, no cases construing
ARIZONA Ariz. Rev. Stat. Ann. § 36-501 et seq. (1974 ed. & 1977 Supp.), 1977 & 1978 Ariz. Sess. Laws, through June 1978	(1) "a danger to himself and in need of treatment" (2) "a danger to others and in need of treatment" or (3) "gravely disabled" (§ 36-540)	180 days (§ 36-540)	Unspecified (trial in superior court) (§ 36-501(2))	"clear and convincing evidence" for dangerous person; unspecified for gravely disabled (§ 36-540)

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
ARKANSAS Ark. Stat. Ann. § 59-101 et seq. (1971 ed. & 1977 Supp.)	"dangerous to himself or to society" (§ 59-408)	"for such time as the [State] deems necessary for proper care and treatment" (§ 59-408)	Yes (§ 59-101)	Unspecified, no cases construing
CALIFORNIA Cal. Welf. & Inst. Code, § 5000 et seq. (West) (1972 ed. & 1978 Supp.), 1978 Cal. Legis. Serv., though June 1978	(1) "imminently dangerous:" person who has "threatened, attempted, or actually inflicted physical harm upon the person of another . . . and . . . presents an imminent threat of substantial physical harm to others" (§ 5304)	(1) 90 days (§ 5304)	(1) Yes (§ 5302)	(1) "clear and convincing proof" (In re Estate of Roulet, 20 Cal. 3d 653, 143 Cal. Rptr. 893, 574 P.2d 1245 (1978))
	(2) gravely disabled: "a condition in which a person, as a result of a mental disorder, is unable to provide for his basic personal needs for food, clothing, or shelter" (§ 5008(h))	(2) One year conservatorship (§ 5360) (court may empower conservator to hospitalize) (§ 5358)	(2) Yes (§ 5350(d))	(2) Unspecified [1/]
COLORADO Colo. Rev. Stat. § 27-10-101 et seq. (1973 ed. & 1976 Supp.), 1977 Colo. Sess. Laws	"danger to others or to himself or gravely disabled" (§ 27-10-111)	One year (§ 27-10-109)	Yes (§ 27-10-109)	"clear and convincing evidence" (§ 27-10-111)

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
CONNECTICUT Conn. Gen. Stat. Ann. § 17 (West) (1978 Supp.)	"dangerous to himself or herself or others or gravely disabled" (§ 17-178)	"for the period of the duration of such mental illness" (§ 17-178)	Unspecified (trial in probate court) (§ 17-177)	"clear and convincing evidence" (§ 17-178)
DELAWARE Del. Code Ann. § 5001 et seq. (1977 ed.)	mental disease or condition "which either (i) renders such person unable to make responsible decisions with respect to his hospitalization, or (ii) poses a real and present threat, based upon manifest indications, that such person is likely to commit or suffer serious harm to himself or others or to property" (§ 5001, §.5010)	"Indefinite" (mandatory report to court every 6 months) (§ 5012)	Unspecified (trial in superior or family court) (§ 5001)	"clear and convincing evidence" (§ 5010)
DISTRICT OF COLUMBIA D.C. Code Ann. § 21-501 et seq. (1973 ed. & 1978 Supp.)	"likely to injure himself or others" (§ 21-545)	"Indeterminate" (§ 21-545)	Yes (§ 21-545)	Beyond a reasonable doubt (In re Ballay, 482 F.2d 648 (D.C. Cir. 1973); In re Hodges, 325 A.2d 605 (D.C. 1974))
FLORIDA Fla. Stat. Ann. § 394.451 et seq. (West) (1976 ed. & 1978 Supp.)	"likely to injure himself or others . . . or in need of care or treatment and lacks sufficient capacity to make a responsible application on his own behalf" (§ 394.467)	One year (§ 394.467)	Unspecified (trial in county court) (§ 394.467)	"clear and convincing evidence" (In re Beverly, 342 So. 2d 481) (Fla. 1977))

6a

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
GEORGIA Ga. Code Ann. § 88-501 et seq. (1971 rev. ed. & 1977 Supp.), 1977 Ga. Laws	(1) "likely to injure himself or others" or (2) "incapable of caring for his physical health and safety" (§ 88-507.1)	6 months (§ 88-507.3(j))	Unspecified (trial in county "court of ordinary") (§ 88-507.2)	Unspecified, no cases construing
HAWAII Haw. Rev. Stat. § 334-1 et seq. (1976 ed. & 1977 Supp.)	"mentally ill or suffering from substance abuse" and "dangerous to himself or others or to property" and "is in need of care and/or treatment, and there is no suitable alternative . . . which would be less restrictive" (§ 334-60)	90 days (§ 334-60)	Unspecified (trial in "any duly constituted court") (§ 334-60)	Beyond a reasonable doubt (§ 334-60)
IDAHO Idaho Code § 66-317 et seq. (1973 ed. & 1977 Supp.), 1977 & 1978 Idaho Sess. Laws, through June 1978	"likely to injure himself or others" (§ 66-329)	Unspecified (mandatory evaluation to be filed with court every four months) (§ 66-329)	Unspecified (trial in district court) (§ 66-328)	Beyond a reasonable doubt (§ 66-329)

7a

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
ILLINOIS Ill. Stat. Ann. ch. 91-1/2, § 1-11 et seq. (Smith-Hurd) (1966 ed. & 1978 Supp.)	"reasonably expected at the time the determination is being made or within a reasonable time thereafter to intentionally or unintentionally physically injure himself or other persons, or is unable to care for himself so as to guard himself from physical injury or to provide for his own physical needs" (§ 1-11, § 8-1)	Unspecified (mandatory report to court every two years) (§ 10-2)	Yes (§ 9-2)	"clear and convincing proof" (In re Stephenson, 67 Ill. 2d 544, 367 N.E. 2d 1273 (Ill. 1977))
INDIANA Ind. Code Ann. § 16-14-9.1-1 et seq. (Burns) (1973 ed. & 1977 Supp.), 1977 Ind. Acts	"gravely disabled or dangerous" and "in need of custody, care, or treatment, or in need of continued custody, care, or treatment" (§ 16-14-9.1-10(d))	Unspecified (mandatory annual report to court) (§ 16-14-9.1-10)	Unspecified (trial in probate court) (§ 16-14-9.1-5)	Unspecified, no cases construing
IOWA Iowa Code Ann. § 225.1 et seq. (West) (1967 ed. & 1978 Supp.), 1978 Iowa Legis. Serv., through June 1978	"a person who is afflicted with mental illness and because of that illness lacks sufficient judgment to make responsible decisions with respect to his or her hospitalization or treatment, and who: a. Is likely to physically injure himself or herself or others if allowed to remain at liberty without treatment; or b. Is likely to inflict serious emotional injury on members of his or her family or	Unspecified (mandatory report to court every 60 days) (§ 229.15)	Unspecified (trial in district court) (§ 229.6)	"clear and convincing evidence" (§ 229.12)

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
IOWA	[continued from previous page] others who lack reasonable opportunity to avoid contact with the afflicted person if the afflicted person is allowed to remain at liberty without treatment" (§ 229.1, § 229.14)			
KANSAS Kan. Stat. § 59-2901 et seq. (1976 ed. & 1977 Supp.), 1977 Kan. Sess. Laws	"any person who is mentally impaired to the extent that such person is in need of treatment and who is dangerous to himself or herself or others and (a) who lacks sufficient understanding or capacity to make responsible decisions with respect to his or her need for treatment, or (b) who refuses to seek treatment, except that no person who is being treated with prayer in the practice of the religion of any church which teaches reliance on spiritual means alone through prayer for healing shall be determined to be a mentally ill person unless substantial evidence is produced upon which the district court finds that the proposed patient is dangerous to himself or herself or others. Proof of a person's failure to meet his or her basic physical needs, to the extent that such failure threatens such person's life, shall be deemed as proof that such person is dangerous to himself or herself" (§ 59-2902)	Unspecified (mandatory report to court every 90 days) (§ 59-2917)	Yes (§ 59-2917)	Beyond a reasonable doubt (§ 59-2917)

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
KENTUCKY Ky. Rev. Stat. Ann. § 202A.010 et seq. (Baldwin) (1969 ed. & 1977 Supp.)	"presents an immediate danger or an immediate threat of danger to self or others . . . and can reasonably benefit from treatment" (§ 202A.080)	360 days (§ 202A.080)	Yes (§ 202A.080)	Beyond a reasonable doubt (Denton v. Commonwealth, 383 S.W. 2d 681 (Ky. 1964))
LOUISIANA La. Rev. Stat. Ann. ch. 28 § 1 et seq. (West) (1975 ed. & 1978 Supp.)	"danger to himself or others or gravely disabled" (§ 54)	"Indefinite" ("for the period of the duration of such mental illness or until he is discharged or conditionally discharged") (§ 55)	Unspecified (trial in "any duly constituted civil court") (§ 55)	"clear and convincing evidence" (§ 55)
MAINE Me. Rev. Stat. tit. 34, § 2251 et seq. (1978 ed.)	"poses likelihood of serious harm" and "inpatient hospitalization is the means best available for the treatment of the patient" (§ 2334)	One year (§ 2334)	Unspecified (trial in district court) (§ 2334)	"clear and convincing evidence" (§ 2334)

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
MARYLAND Md. Ann. Code, art. 59, § 1 et seq. (1972 ed. & 1977 Supp.), 1977 Md. Laws	"in need of institutional inpatient care or treatment," and "presents a danger to his own life or safety or the life or safety of others" (Reg. 10.04.03G Department of Health and Mental Hygiene)	Unspecified	Unspecified[2/] (administrative hearing officer) (§ 12) (see also Reg. 10.04.03G, Department of Health and Mental Hygiene)	"clear and convincing evidence" (Reg. 10.04.03G, Dept. of Health and Mental Hygiene)
MASSACHUSETTS Mass. Ann. Laws ch. 123, § 1 et seq. (Michie/Law. Co-op.) (1972 ed. & 1978 Supp.)	(1) "a substantial risk of physical harm to the person himself as manifested by evidence of threats of, or attempts at, suicide or serious bodily harm" (2) "a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them" or (3) "a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person's judgment is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community" (§ 8)	One year (§ 8)	Unspecified (trial in district court) (§ 8)	Beyond a reasonable doubt (Super. of Worcester State Hospital v. Hagberg, ___ Mass. ___, 372 N.E. 2d 242 (1978))

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
MICHIGAN Mich. Stat. Ann. § 14.800(400a) et seq. (1976 ed. & 1978 Supp.)	(1) A person who "can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure himself or another person, and who has engaged in an act or acts or made significant threats that are substantially supportive of the expectation" (2) A person who "is unable to attend to those of his basic physical needs such as food, clothing, or shelter that must be attended to in order for him to avoid serious harm in the near future, and who has demonstrated that inability by failing to attend to those basic physical needs" or (3) A person "whose judgment is so impaired that he is unable to understand his need for treatment and whose continued behavior as the result of this mental illness can reasonably be expected, on the basis of competent medical opinion, to result in significant physical harm to himself or others" (§ 14.800(401))	"continuing hospitalization" for "an unspecified period of time" (§ 14.800(472))	Yes (§ 14.800(458))	"clear and convincing evidence" (§ 14.800(465))
MINNESOTA Minn. Stat. Ann. § 253A.01 et seq. (West) (1971 ed. & 1978 Supp.), 1978 Minn. Laws	"hospitalization is necessary for his own welfare or the protection of society; that is, that the evidence of his conduct clearly shows: (i) that he has attempted to or threatened to take his own life or	"Indeterminate" (§ 253A.07)	Unspecified (trial in probate court) (§ 253A.07)	Beyond a reasonable doubt (Lausche v. Commissioner of Public Welfare, 302 Minn. 65, 225 N.W. 2d

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
MINNESOTA	[continued from previous page] attempted to seriously physically harm himself or others; or (ii) that he has failed to protect himself from exploitation from others; or (iii) that he has failed to provide for his own needs for food, clothing, shelter, safety or medical care; and . . . [that the court] finds no suitable alternative to involuntary hospitalization" (§ 253A.02)			366 (1974), cert. denied, 420 U.S. 993 (1975))
MISSISSIPPI Miss. Code Ann. § 41-21-61 et seq. (1977 Supp.), 1977 Miss. Laws	"reasonably expected . . . to intentionally or unintentionally physically injure himself or other persons, or is unable to care for himself so as to guard himself from physical injury, or to provide for his own physical needs" (§ 41-21-62(c))	Unspecified (commitment order not appealable) (§ 41-21-75)	Unspecified (hearing before chancellor or special master) (§ 41-21-75)	Preponderance of the evidence (§ 41-21-75)
MISSOURI Mo. Ann. Stat. tit. 12, ch. 202 et seq. (Vernon) (1972 ed. & 1978 Supp.)	"in need of custody, care or treatment in a mental facility and, because of his mental condition, lacks sufficient insight or capacity to make responsible decisions with respect to his hospitalization" (§ 202.807)	"Indeterminate" (§ 202.807)	Unspecified (trial in probate court) (§ 202.807)	Unspecified, no cases construing

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
MONTANA Mont. Rev. Codes Ann. § 38-1305 et seq. (1977 Supp.)	"suffering from a mental disorder which has resulted in self-inflicted injury or injury to others or the imminent threat thereof or which has deprived the person afflicted of the ability to protect his life or health" (§ 38-1302(14))	One year (§ 38-1306(4))	Yes (§ 38-1305(6))	"proof beyond a reasonable doubt with respect to any physical facts or evidence and clear and convincing evidence as to all other matters, except that mental disorders shall be evidenced to a reasonable medical certainty" (§ 38-1305(7))
NEBRASKA Neb. Rev. Stat. § 83-1001 et seq. (1977 Supp.), 1977 Neb. Laws, through June 1977	"mentally ill dangerous person" for whom neither "voluntary hospitalization or other treatment alternatives less restrictive of the subject's liberty" are available (§ 83-1036) "mentally ill dangerous person" defined as one who presents: (1) "A substantial risk of serious harm to another person or persons within the near future, as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm" or (2) "A substantial risk of serious harm to himself within the near future, as manifested by evidence of recent attempts at, or threats of, suicide or serious bodily harm, or evidence of inability to provide for basic human needs" (§ 83-1009)	Unspecified	Unspecified (administrative hearing before Mental Health Board) (§ 83-1035)	"clear and convincing proof" (§ 83-1035)

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
NEVADA Nev. Rev. Stat. § 433A (1975 ed. & 1977 Supp.), 1977 Nev. Stats. through September 1977	"likely to harm himself or others if allowed to remain at liberty, or is gravely disabled" (§ 433A.310(1)(b))	6 months (§ 433A.310(2))	Unspecified (trial in district court) (§ 433A.310(1))	Unspecified, no cases construing
NEW HAMPSHIRE N.H. Rev. Stat. Ann. § 135-B:26 et seq. (1977 ed.)	"in such mental condition as a result of mental illness as to create a potentially serious likelihood of danger to himself or to others" (§ 135-B:26)	Two years (§ 135-B:38)	Unspecified (trial in probate court) (§ 135-B:38)	Beyond a reasonable doubt (Proctor v. Butler, 380 A.2d 673 (N.H. 1977))
NEW JERSEY N.J. Stat. Ann. § 30:4-1 et seq. (West) (1977 Supp.), 1977 N.J. Laws, 1978 N.J. Sess. Law Serv. through April 1978	"requires care and treatment for his own welfare, or the welfare of others, or of the community" (§ 30:4-44, § 30:4-23)	Unspecified	Unspecified (trial in county court) (§ 30:4-44)	Unspecified [3]

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
NEW MEXICO N.M. Stat. Ann. § 34-2A-1 et seq. (1977 Supp.), 1977 N.M. Laws	"as a result of a mental disorder the client presents a likelihood of danger to himself or others; the client's condition is likely to improve with the proposed treatment; and the proposed commitment is consistent with the least drastic means principle" (§ 34-2A-10)	120 days (§ 34-2A-11(c))	Yes (§ 34-2A-11(b))	"clear and convincing evidence" (§ 34-2A-11(c))
NEW YORK N.Y. Mental Hyg. Law § 31.27 et seq. (McKinney) (1975 ed. & 1978 Supp.), 1978 N.Y. Laws, through May 1978	"in need of involuntary care and treatment" (§ 31.31)	Two years (§ 31.33(d))	Unspecified (trial in supreme court or county court) (§ 31.33(d))	Unspecified [4/]
NORTH CAROLINA N.C. Gen. Stat. § 122-58.1 et seq. (1974 ed. & 1977 Supp.)	"mentally ill or inebriate, and imminently dangerous to himself or others" (§ 122-58.7(i))	One year (§ 122-58.11(e))	Unspecified (trial in district court) (§ 122-58.7(a))	"clear, cogent and convincing evidence" (§ 122-58.7(i))

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
NORTH DAKOTA N.D. Cent. Code § 25-01-01 et seq. (1970 ed. & 1977 Supp.)	(1) "A person who is mentally ill, an alcoholic, or a drug addict and who as a result of such condition can reasonably be expected within the near future to intentionally or unintentionally seriously physically harm himself or another person, and who has engaged in an act or acts or made significant threats that are substantially supportive of this expectation" or (2) "A person who is mentally ill, an alcoholic, or a drug addict and who as a result of such condition is unable to attend to his basic physical needs, such as food, clothing, or shelter, that must be attended to for him to avoid serious harm in the near future, and who has demonstrated that inability by failing to meet those basic physical needs" (§ 25-03.1-02(11))	"continuing hospitalization order" (status reports required to be filed with the court every 6 months) (§ 25-03.1-31)	Unspecified (trial in county court) (§ 25-03.1-19)	"clear and convincing evidence" (§ 25-03.1-20)
OHIO Ohio Rev. Code Ann. § 5122.01 et seq. (Page) (1970 ed. & 1977 Supp.), 1977 & 1978 Ohio Laws, through May 1978	"person who . . . (1) Represents a substantial risk of physical harm to himself as manifested by evidence of threats of, or attempts at, suicide or serious self-inflicted bodily harm; (2) Represents a substantial risk of harm to others as manifested by evidence of recent homicidal or other violent behavior	Two years (§ 5122.15(H))	Unspecified (hearing in probate court) (§ 5122.01(Q))	"clear and convincing evidence" (§ 5122.15(B))

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
OHIO	[continued from previous page] or evidence of recent threats that place another in reasonable fear of violent behavior and serious physical harm; (3) Represents a substantial or immediate risk of serious physical impairment or injury to himself as manifested by evidence that he is unable to provide for and is not providing for his basic physical needs because of his mental illness and that appropriate provision for such needs cannot be made immediately available in the community; or (4) Would benefit from treatment . . . and is in need of [it] as manifested by evidence of behavior that creates a grave and imminent risk to substantial rights of others or himself" (§ 5122.01, § 5122.15(B))			

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
OKLAHOMA Okla. Stat. Ann. tit. 43A, § 54.1 et seq. (West) (1977 ed.), 1977 & 1978 Okla. Sess. Laws, through April 1978	(1) "A person who has a demonstrable mental illness and who as a result of that mental illness can be expected within the near future to intentionally or unintentionally seriously and physically injure himself or another person" or (2) "A person who has a demonstrable mental illness and who as a result of that mental illness is unable to attend to those of his basic physical needs such as food, clothing or shelter that must be attended to in order for him to avoid serious harm in the near future and who has demonstrated such inability by failing to attend to these basic physical needs in the recent past" (§ 3(e), § 54.1(A)(1))	Unspecified	Yes (§ 54.1(B)(4))	Beyond a reasonable doubt (§ 54.1(C))
OREGON Or. Rev. Stat. § 426.005 et seq. (1977 Cum. Supp.), 1977 Or. Laws	(1) "Dangerous to himself or others" or (2) "Unable to provide for his basic personal needs and is not receiving such care as is necessary for his health or safety" (§ 426.005, § 426.130)	180 days (§ 426.070)	Unspecified (trial in probate court) (§ 426.070)	Beyond a reasonable doubt (§ 426.130)

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
PENNSYLVANIA Pa. Cons. Stat. Ann. tit. 50, § 7301 et seq. (Purdon) (1969 ed. & 1978 Supp.) 1978 Pa. Legis. Serv., through April 1978	"poses a clear and present danger of harm to others or to himself" "Determination of Clear and Present Danger - (1) Clear and present danger to others shall be shown by establishing that within the past 30 days the person has inflicted or attempted to inflict serious bodily harm on another and that there is a reasonable probability that such conduct will be repeated . . . ." "(2) Clear and present danger to himself shall be shown by establishing that within the past 30 days: (i) the person has acted in such manner as to evidence that he would be unable, without care, supervision and the continued assistance of others, to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety, and that there is a reasonable probability that death, serious bodily injury or serious physical debilitation would ensue within 30 days unless adequate treatment were afforded under this act; or (ii) the person has attempted suicide and that there is the reasonable probability of suicide unless adequate treatment is afforded under this act; or (iii) the person has severely mutilated himself or attempted to mutilate himself severely and that there is the reasonable probability of mutilation unless adequate treatment is afforded under this act." (§ 7301)	90 days (§ 7304(g))	Unspecified (trial in court of common pleas) (§ 7115(a))	"clear and convincing evidence" (§ 7304(f))

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
RHODE ISLAND R.I. Gen. Laws § 26-2 (1957 ed. & 1977 Cum. Supp.)	"detention . . . necessary for his own welfare or for the safety of the public" (§ 26-2-3)	Until patient "be restored to soundness of mind" or detention "no longer necessary for his own welfare or for the safety of others" (§ 26-2-3)	Unspecified (trial in district court) (§ 26-2-3)	Unspecified, no cases construing
SOUTH CAROLINA S.C. Code § 44-17 (1976 ed. & 1977 Supp.)	(1) "lacks sufficient insight or capacity to make responsible decisions with respect to his treatment" or (2) "there is a likelihood of serious harm to himself or others" (§ 44-17-580)	Unspecified	Not specified (trial in probate court) (§ 44-17-620)	"clear and convincing evidence" (§ 44-17-580)
SOUTH DAKOTA S.D. Codified Laws Ann. § 27A-1-1 et seq. (1976 ed. & 1977 Supp.)	(1) "He lacks sufficient understanding or capacity to make responsible decisions concerning his person so as to interfere grossly with his capacity to meet the ordinary demands of life" or (2) "He is a danger to himself or others" (§ 27A-1-1) Person must be found to be "in need of treatment" (§ 27A-9-18)	Unspecified	Unspecified (administrative hearing by County Board of Mental Illness) (§ 27A-9-16)	"clear and convincing evidence" (§ 27A-9-18)

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
TENNESSEE Tenn. Code Ann. § 33-301 et seq. (1977 ed.)	"possesses a likelihood of serious harm," and "all available less drastic alternatives to commitment to a mental hospital or treatment resource are unsuitable" (§ 33-604(d))	Unspecified	Yes (Craddock v. Calcutt, 285 S.W. 2d 528 (1955))	"clear, unequivocal and convincing evidence" (§ 33-604(d))
TEXAS Tex. Rev. Civ. Stat. art. 5547 (Vernon) (1958 ed. & 1978 Supp.)	"for his own welfare and protection or the protection of others" (§ 52(b))	"Indefinite" (§ 52(b))	Yes (§ 48)	Preponderance of the evidence (State v. Turner, 546 S.W. 2d 563 (1977) cert. denied, 46 U.S.L.W. 3586 (March 20, 1978))
UTAH Utah Code Ann. § 64-7-1 et seq. (1977 ed. & 1978 Supp.)	(1) "There is an immediate danger that the proposed patient will injure himself . . . if allowed to remain at liberty" or (2) "Is in need of custodial care or treatment in a mental health facility" and "(i) lacks sufficient insight to make responsible decisions as to the need for care and treatment as demonstrated by evidence of unwillingness or inability to follow through with treatment, the need for said treatment having been adequately demonstrated to the courts, or (ii) lacks sufficient capacity to provide himself . . . with the basic necessities of life" (§ 64-7-36(6))	"Indeterminate period" (§ 64-7-36(7))	Unspecified (trial in district court) (§ 64-7-36(1))	Beyond a reasonable doubt (§ 64-7-36(6))

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
UTAH	[continued from previous page] In both cases, court must find that there is "no appropriate less restrictive alternative to a court order of hospitalization" (§ 64-7-36(6))			
VERMONT Vt. Stat. Ann. tit. 18, ch. 171 (1968 ed. & 1977 Supp.)	(1) "presents a substantial risk of injury to himself or others if allowed to remain at liberty" or (2) "lacks sufficient insight or capacity to make a responsible decision concerning his mental condition and is in need of custody, care or treatment" (§ 7607)	"Indeterminate period" (§ 7608)	Unspecified (trial in probate court) (§ 7607)	Unspecified, no cases construing
VIRGINIA Va. Code § 37.1-1 et seq. (1950 ed. & 1977 Supp.), 1978 Va. Acts	"such person (a) presents an imminent danger to himself or others as a result of mental illness, or (b) has otherwise been proven to be so seriously mentally ill as to be substantially unable to care for himself, and (c) that there is no less restrictive alternative to institutional confinement" (§ 37.1-67-3)	180 days (§ 37.1-67-3)	Unspecified (trial in district court) (§ 37.1-67-3) (jury trial available on appeal) § 37.1-67-6)	Unspecified, no cases construing

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
WASHINGTON Wash. Rev. Code Ann. § 71.05.020 et seq. (1975 ed. & 1977 Supp.)	(1) "has threatened, attempted or inflicted physical harm upon the person of another," and "as a result of mental disorder presents a likelihood of serious harm to others" or (2) continues to be "in danger of serious physical harm resulting from a failure to provide for his essential human needs" (§ 71.05.320, § 71.05.020)	180 days (§ 71.05.320)	Yes (§ 71.05.310)	"clear, cogent and convincing evidence" (§ 71.05.310)
WEST VIRGINIA W.Va. Code, § 27-1-2 et seq. (1976 ed. & 1977 Supp.), 1977 W.Va. Acts	"likely to cause serious harm to himself or to others if allowed to remain at liberty" (§ 27-5-4(d))	"Indeterminate" (§ 27-5-4(d))	Unspecified (trial in circuit court) (§ 27-5-1)	"clear, cogent, and convincing proof" (State ex rel. Hawks v. Lazaro, 202 S.E. 2d 109 (W. Va. 1974))
WISCONSIN Wis. Stat. Ann. § 51.001 et seq. (West) (1957 ed. & 1977 Supp.), 1977 Wis. Laws, 1978 Wis. Legis. Serv., through May 1978	"1. Is mentally ill, drug dependent, or developmentally disabled and is a proper subject for treatment; and either 2. Is dangerous because of: a. A substantial risk of physical harm to the subject individual as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm; or b. A substantial risk of physical harm to other persons as manifested by evidence of recent homicidal or other violent behavior,	One year (§ 51.20(14)(g))	Yes (§ 51.20(12))	Beyond a reasonable doubt (§ 51.20(14)(e))

State Statute	Criteria for Extended Confinement of Mentally Ill	Maximum Duration of Commitment Order	Right to Jury Trial	Standard of Proof
WISCONSIN	[continued from previous page] or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt or threat to do such physical harm; or 3. Evidences a very substantial risk of physical impairment or injury to the subject individual, as manifested by evidence that his or her judgment is so affected that he or she is unable to protect himself or herself in the community and that reasonable provision for his or her protection is not available in the community . . ." (§ 51.20(2))			
WYOMING Wyo. Stat. § 25-49 et seq. (1967 ed. & 1975 Supp.), 1976 & 1977 Wyo. Sess. Laws.	(1) "likely to injure himself or others" or (2) "is in need of care or treatment in a hospital and, because of his illness, lacks sufficient capacity to make responsible decisions with respect to his hospitalization" (§ 25-60(j))	Unspecified	Unspecified (trial in district court) (§ 25-60(i))	Unspecified, no cases construing

FOOTNOTES

4/ In New York, preponderance of the evidence has been held sufficient where commitment is temporary. Fhagen v. Miller, 65 Misc. 2d 168, 317 N.Y.S.2d 128 (Sup. Ct. 1970), aff'd, 36 A.D.2d 926, 321 N.Y.S.2d 61, aff'd, 29 N.Y.2d 348, 278 N.E.2d 926, 321 N.Y.S. 2d 393 (1972), cert. denied, 409 U.S. 845 (1972)(involving 15- and 60-day commitment orders).

2/ An alternative judicial procedure for commitment of the mentally ill appears to exist in the Estates and Trusts Article of the Maryland Code, but has not been widely used. Md. Est. & Trusts Code Ann. § 13-704 (1974 ed. & 1977 Supp.). This section provides that the court "may superintend and direct the care of a disabled person, appoint a guardian of the person, and pass orders and decrees respecting the person as seems proper, including an order directing the disabled person to be sent to a hospital." Procedures in such cases are to be in accordance with the Maryland Rules, which Rules in turn provide for a jury determination on the issue of mental disability. See Rules R-73, R-77 (b)(1).

3/ In New Jersey, the lower courts have held that the reasonable doubt standard applies to civil commitment of the mentally ill, see, e.g., In re J.W., 44 N.J. Super. 216, 130 A.2d 64 (App. Div.), cert. denied, 24 N.J. 465, 132 A.2d 558 (1957); In re Heukelekian, 24 N.J. Super. 407, 94 A.2d 501 (App. Div. 1953), though a more recent decision of the New Jersey Supreme Court in a case involving the commitment of an individual acquitted of a criminal charge by reason of insanity has cast some doubt on the continued validity of these cases. State v. Krol, 68 N.J. 326, 344 A.2d 289 (1975).

4/ In California, proof beyond a reasonable doubt is required in proceedings to commit "mentally disordered sex offenders," People v. Burnick, 14 Cal. 3d 306, 121 Cal. Rptr. 488, 535 P.2d 352 (1975), and narcotics addicts, People v. Thomas, 19 Cal. 3d 630, 139 Cal. Rptr. 594, 566 P.2d 228 (1977). The California Supreme Court has contrasted the procedural requirements for grave disability proceedings with those applicable where the state seeks to commit "imminently dangerous" persons, suggesting that the proper analogue for commitments in the latter category would be those cases in which it has required proof beyond a reasonable doubt. See In re Estate of Roulet, 20 Cal. 3d 653, 143 Cal. Rptr. 893, 574 P.2d 1245 (1978).